

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WAPATO HERITAGE, LLC, a
Washington Limited Liability
Company; KENNETH EVANS; JOHN
WAYNE JONES; and JAMIE JONES,
individual residents of
Washington State,

Plaintiffs,

v.

SANDRA D. EVANS, an
individual, not a resident of
Washington State; and DAN
GARGAN, a citizen of Arizona,

Defendants.

NO. CV-07-314-EFS

ORDER ON DISCOVERY MOTIONS

BEFORE THE COURT, without oral argument, are Defendant Dan Gargan's
Motions to Strike Plaintiffs' Objection and Compel Response to: (1)
Interrogatory No. 1 (Ct. Rec. 68); (2) Interrogatory Nos. 2, 5, 8, 9, 10,
and 14 (Ct. Rec. 71); (3) Request for Production Nos. 1, 3 through 9, and
to Strike Plaintiffs' Reliance on FRCP 33(c) in Response to Interrogatory
Nos. 4 and 6 (Ct. Rec. 74); and (4) Interrogatory Nos. 11, 12. (Ct. Rec.
77). Also before the Court are Plaintiffs' Motion to Compel Discovery
(Ct. Rec. 81) and Ms. Buckholtz' Motion for Protective Order of Non-Party
Witness (Ct. Rec. 103).

1 The Court has reviewed the motions and submitted materials and is
2 fully informed. The Court grants Plaintiffs' Motion to Compel Discovery
3 and Ms. Buckholtz's Motion for Protective Order of Non-Party Witness.
4 The Court grants in part and denies in part Defendant Gargan's Motions
5 to Strike Plaintiff's Objections and Compel Response to (1) Interrogatory
6 No. 1; (2) Interrogatory Nos. 2, 5, 8, 9, 10, and 14; (3) Request for
7 Production Nos. 1, 3 through 9, and to Strike Plaintiffs' Reliance on
8 FRCP 33(c) in Response to Interrogatory Nos. 4 and 6; and (4)
9 Interrogatory Nos. 11, 12. The reasons for the Court's Order are set
10 forth below.

11 I. Background

12 Plaintiffs entered into a Settlement and Release Agreement
13 ("Settlement Agreement") with Defendant Sandra D. Evans on or about
14 September 2, 2005. Plaintiffs allege that Defendant Evans breached the
15 Settlement Agreement by failing to (1) deliver to Plaintiffs the funds
16 required by Section IV.H.3, and (2) pay Plaintiffs the excess
17 distribution she received from the Bureau of Indian Affairs IIM account
18 of her deceased father, William Wapato Evans. (Ct. Rec. 1 at 8.)
19 Plaintiffs further allege that Defendant Gargan, as Defendant Evans'
20 financial advisor, tortiously interfered with Plaintiffs' reasonable
21 contractual expectations by advising Defendant Evans in connection with
22 the alleged breaches of the Settlement Agreement. *Id.* at 9.

23 On June 25, 2008, the parties filed five motions to compel
24 discovery, four filed by Defendant Gargan¹, and one filed by Plaintiffs,

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26 ¹ For ease of reference, Defendant Gargan will be referred to
simply as "Defendant" for the remainder of the Order.

1 Wapato Heritage, LLC. (Ct. Recs. 68, 71, 74, 77, 81.) Both parties
2 assert that the other improperly maintained objections, failed to answer
3 interrogatories, and failed to respond to requests for production.
4 Further, non-party deponent Shelley Buckholtz moves this Court for a
5 Protective Order of Non-Party Witness in relation to discovery costs
6 associated with producing subpoenaed documents. (Ct. Rec. 103.)

7 **II. Discussion**

8 **A. Standard**

9 A district court has wide discretion in controlling discovery.
10 *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Moreover,
11 pre-trial discovery is ordinarily "accorded a broad and liberal
12 treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). A party may
13 object to an interrogatory, but the grounds for objection must be stated
14 with specificity. FED. R. CIV. P. 33(b)(4). The burden is on the
15 objecting party to show why an interrogatory is improper. *Id.*

16 Absent a valid objection, the production of evidence can be
17 compelled regarding any matter "relevant to the subject matter involved
18 in the action" or "reasonably calculated to lead to the discovery of
19 admissible evidence." FED. R. CIV. P. 26(b)(1). This broad discovery
20 right is based on the general principle that litigants have a right to
21 "every man's evidence," and that "wide access to relevant facts serves
22 the integrity and fairness of the judicial process by promoting the
23 search for truth." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

24 Rule 37(a) governs the failure to cooperate in discovery. After a
25 good faith attempt to confer with the non-disclosing party, a party may
26 move for an order compelling an answer or production. A motion to compel

1 is appropriate where a deponent fails to answer a question asked under
2 Rules 30 or 31, or a party fails to answer an interrogatory submitted
3 under Rule 33. FED. R. CIV. P. 37(a)(1).

4 Here, Rule 37(a)(1)'s prerequisite requirement is satisfied because
5 the parties conferred on July 28, 2008, and did not resolve the
6 disclosure objections. (Ct. Rec. 80.) On August 1, the parties
7 submitted a joint statement pursuant to Rule 37. The following issues
8 were left unresolved. (Ct. Rec. 124.)

9 **A. Defendant's Motions to Strike Objection/Compel Response**

10 **1. Interrogatory Nos. 1, 2, 5, 8, 9, 10, 14**

11 Defendant moves to strike Plaintiffs' objections and compel
12 responses to Interrogatories 1, 2, 5, 8, 9, 10, and 14, which require
13 Plaintiffs to identify and describe specific evidence supporting their
14 claims. Plaintiffs argue that compelling a response would be inequitable
15 because Defendant refused to disclose related information in his
16 deposition. Notwithstanding their objections, Plaintiffs affirm that
17 they have supplied a complete answer to each Interrogatory and provided
18 all relevant documentation. (Ct. Recs. 93 at 3; 124 at 5, 7.)

19 Here, Plaintiffs' equity-based objections are improper for two (2)
20 reasons. First, Interrogatories 1, 2, 5, 8, 9, 10, and 14 are directly
21 related to Plaintiffs' claims. Second, Plaintiffs have the right to
22 compel withheld discovery.

23 Nevertheless, Plaintiffs affirm that all relevant documentation has
24 been produced, notwithstanding their objections. The Court, therefore,
25 grants Defendant's Motion to Strike Plaintiffs' Objections to
26

1 Interrogatories 1, 2, 5, 8, 9, 10, and 14 and denies Defendant's Motion
2 to Compel Discovery as moot.

3 **2. Requests for Production Nos. 1, 3-9, Interrogatory Nos. 11, 12**

4 Defendant also asks the Court to strike Plaintiffs' objections and
5 compel responses to Requests for Production Nos. 1, 3-9 and Interrogatory
6 Nos. 11 and 12, which pertain to the drafting, negotiation, and meaning
7 of the settlement agreement. (Ct. Rec. 75 at 4.) Defendant asserts that
8 the documents are relevant to the claimed breach of contract.
9 Plaintiffs, however, argue that Defendant's only purpose for Requests for
10 Production Nos. 1, 3-9 and Interrogatory Nos. 11 and 12 is to attempt an
11 "impossible collateral attack" on the settlement agreement - making
12 document production unnecessary. (Ct. Rec. 93 at 5.) Plaintiffs again
13 affirm that all relevant documentation has been produced. (Ct. Rec. 124
14 at 6, 8.)

15 Given the broad scope of discovery outlined above, the Court finds
16 that Requests for Production Nos. 1, 3-9 and Interrogatory Nos. 11 and
17 12 are relevant to Plaintiffs' claims and reasonably calculated to lead
18 to the discovery of admissible evidence. Plaintiffs' objection is based
19 on mere conjecture and improperly forestalls discovery of relevant
20 material. Both parties, however, note that all relevant documentation
21 has been produced through Ms. Buckholtz's subpoena. (Ct. Rec. 124 at 8.)
22 The Court, therefore, grants Defendant's Motion to Strike Plaintiffs'
23 Objections to Requests for Production Nos. 1, 3-9 and Interrogatory Nos.
24 11 and 12 and denies Defendant's motions to compel discovery as moot.

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1 **3. Striking Reliance on FRCP 33(c) in Interrogatory Nos 4,6.**

2 Defendant also seeks to strike Plaintiff's reliance on Federal Rule
3 of Civil Procedure 33(c) in response to Interrogatory Nos. 4 and 6. (Ct.
4 Rec. 75 at 2.) Interrogatory Nos. 4 and 6 require Plaintiff to identify
5 and describe specific documents supporting the elements of their claims.
6 Plaintiffs have agreed to modify their reliance on Rule 33(c) and provide
7 a spreadsheet identifying previously-produced documents responsive to
8 Interrogatory Nos. 4 and 6. (Ct. Rec. 124 at 6-7.) Based on Plaintiff's
9 affirmation, the Court finds that all discoverable information has been
10 provided and denies Defendant's motion as moot.

11 **B. Plaintiff's Motions to Strike Objection/Compel Response**

12 **1. Reconvened Deposition**

13 Plaintiffs ask the Court to order renewed deposition of Defendant
14 Gargan because he previously withheld testimony on the basis of
15 attorney/client privilege. (Ct. Rec. 82 at 2.) Specifically, Plaintiff
16 asserts that Defendant refused to disclose the content and timing of e-
17 mail, telephonic, or in-person communications with Sandra D. Evans, and
18 further, failed to disclose the existence of a partnership with Ms. Evans
19 in First Phoenix International, Inc. *Id.* Defendant responds that renewed
20 deposition is unnecessary because he answered all questions asked of him
21 and his communications with Ms. Evans are shielded from discovery by the
22 attorney-client privilege. (Ct. Recs. 91 at 4; 72 at 3; 124 at 3.)

23 The oft-quoted attorney-client privilege standard is found in 8
24 Wigmore, Evidence § 2292:

25 (1) Where legal advice of any kind is sought (2) from a
26 professional legal adviser in his capacity as such, (3) the
 communications relating to that purpose, (4) made in confidence
 (5) by the client, (6) are at his instance permanently

1 protected (7) from disclosure by himself or by the legal
2 adviser, (8) except the protection be waived.

3 Although the attorney-client privilege may in some instances extend
4 to communications to third parties providing assistance to an attorney,
5 communications by a client to one who is not a lawyer are not protected
6 unless the communication made in *confidence* for the purpose of obtaining
7 *legal advice from the lawyer*. *State v. Aquino-Cervantes*, 88 Wn. App.
8 699, 708 (1997) (quoting *United States v. Kovel*, 296 F.2d 918, 922 (2nd
9 Cir. 1961)) (emphasis in original). One claiming an attorney-client
10 privilege has the burden of showing that the requested information comes
11 within the privilege. *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981).

12 Here, Defendant failed to demonstrate that his communications with
13 Ms. Evans were made in confidence or that they were for the purpose of
14 obtaining legal advice from a lawyer. The fact that Defendant may be an
15 employee of the Wynne Law Firm is insufficient to shield relevant
16 communications and details of peripheral business relationships from
17 discovery. The Court, therefore, finds that Defendant has failed to
18 demonstrate a basis for asserting attorney-client privilege and allows
19 Plaintiffs a 3-hour renewed deposition in Arizona, strictly limited to
20 the topics outlined on page two (2) of Plaintiffs' Motion to Compel (Ct.
21 Rec. 81).

22 **2. Requests for Production Nos. 1, 2, 3 and Interrogatory No. 3**

23 Plaintiffs ask the Court to strike Defendant's objections and compel
24 responses to Requests for Production Nos. 1, 2, 3 and Interrogatory No.
25 3, which ask Defendant to identify witnesses and provide all
26 documentation that relates or pertains to his defenses. Plaintiffs
 assert that Defendant withheld numerous documents relating to his

1 defenses. (Ct. Rec. 82 at 6.) Defendant contends that complete
2 responses were provided and that none of the documents identified by
3 Plaintiffs "relate" to his defenses in this case. (Ct. Rec. 91 at 8.)

4 Defendant, however, reads Plaintiffs' requests to narrowly. The
5 instructions to the discovery requests included a broad definition to the
6 word "relate" to guide Defendant's interpretation. Under any
7 interpretation, the documents listed by Plaintiffs are relevant to
8 Defendant's good faith defense, and must be produced. The Court,
9 accordingly, grants Plaintiffs' motion to strike Defendant's objection
10 and compels discovery.

11 **B. Ms. Buckholtz's Motion for Protective Order of Non-Party Witness**

12 Non-party attorney Shelley Buckholtz and her firm, Mikkeltorg, Broz,
13 Wells and Fryer, PLLC (Mikkeltorg), ask the Court to determine which
14 entity or entities are responsible for paying the costs associated with
15 producing the documents subpoenaed by Defendant. (Ct. Rec. 108 at 4.)
16 Prior to disclosure, defense counsel agreed to pay the responsive costs,
17 estimated at \$7,500. (Ct. Rec. 103-2 at 2.) Defendant argues, however,
18 that Plaintiffs should reimburse Ms. Buckholtz because they improperly
19 objected to requests for production and withheld materials from
20 discovery, forcing Defendant to subpoena documents from Ms. Buckholtz.
21 (Ct. Recs. 106 at 8; 124 at 8.)

22 Federal Rule of Civil Procedure 45(c)(1), requires the Court to
23 protect persons subject to a subpoena duces tecum from undue burden or
24 expense. This duty is at its apex where non-parties are subpoenaed.
25 *United States v. Columbia Broadcasting Sys.*, 666 F.2d 364, 371-72 (9th
26 Cir. 1982) (noting that non-parties are powerless to control the scope

1 of discovery, and should not be forced to subsidize an unreasonable share
2 of the costs of litigation to which they are not a party). Non-party
3 status is also an important factor in determining whether to allocate
4 discovery costs on the demanding or producing party. *Id.*

5 Here, neither Ms. Buckholtz or Mikkeltorg are parties to the present
6 case and the subpoena compliance costs, \$9,975.80, are unreasonably
7 burdensome. Buckholtz and Mikkeltorg are, therefore, not required to pay
8 their compliance costs. The Court finds Defendant, as the demanding
9 party, responsible for Ms. Buckholtz and Mikkeltorg's costs to date. The
10 Court does not assign Plaintiffs any portion of subpoena costs. The
11 Court is unable to determine, based on the present record, whether or not
12 Plaintiffs improperly withheld materials ultimately subpoenaed from Ms.
13 Buckholtz. Defendants are free to seek relief from this Order upon
14 further showing of Plaintiffs' access and subsequent withholding of
15 subpoenaed materials. Such relief must be raised by motion and supported
16 by necessary affidavits, declarations, and/or exhibits according to Local
17 Rule 7.1.

18 **III. Conclusion**

19 Accordingly, **IT IS HEREBY ORDERED:**

20 1. Defendant Gargan's Motion to Strike Plaintiff's Objection and
21 Compel Response to Interrogatory No. 1 (**Ct. Rec. 68**) is **GRANTED** (strike
22 objection) **AND DENIED AS MOOT** (compel) **IN PART.**

23 2. Defendant Gargan's Motion to Strike Plaintiff's Objection and
24 Compel Response to Interrogatory Nos. 2, 5, 8, 9, 10, and 14 **GRANTED**
25 (strike objection) **AND DENIED AS MOOT** (compel) **IN PART.**

5. Plaintiffs' Motion to Compel Discovery (**Ct. Rec.81**) is **GRANTED**. Plaintiffs are allowed a 3-hour renewed deposition in Arizona, strictly limited to the topics outlined on page two (2) of Plaintiffs' Motion to Compel Discovery.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge